Martin K. Banks (#5443)
STOEL RIVES
201 South Main, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 578-6975
Fax: (801) 578-6999

Michael G. Jenkins (#4350)
Assistant General Counsel
PacifiCorp
201 South Main, Suite 2200
Salt Lake City, UT 84111
Telephone: (801) 220-2233
Fax: (801) 220-3299

Attorneys for PacifiCorp

BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power Company, 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	**PACIFICORP'S REPLY TO SIERRA CLUB'S CONSOLIDATED OPPOSITION TO MOTIONS FOR JUDGMENT ON THE PLEADINGS**

PacifiCorp previously filed its Motion for Judgment on the Pleadings, requesting that the Utah Air Quality Board (the "Board") dismiss, as a matter of law, two of the issues raised in Sierra Club's November 12, 2006 Request for Agency Action ("Request for Agency Action"): (i) whether Integrated Gasification Combined Cycle ("IGCC") technology must be included in the Best Available Control Technology ("BACT") analysis; and (ii) whether "carbon dioxide and other greenhouse gas emissions" (collectively "GHG") must be regulated or considered as part of this air permitting process. Contemporaneous with PacifiCorp's filing of its Motion, the Executive Secretary and the Sevier Power Company ("SPC") filed similar Motions requesting

that the Board dismiss these same two issues.[1] On March 19, Sierra Club filed its Consolidated Opposition to Motions for Judgment on the Pleadings ("Opposition"). This Reply is filed in response to that Opposition.

I. UNDER THE APPLICABLE LEGAL STANDARD, THE IGCC AND GHG ISSUES SHOULD BE DISMISSED BECAUSE THEY INVOLVE ONLY QUESTIONS OF LAW

As to Sierra Club's claims that are legal in nature, such as the IGCC and GHG issues, the Board need only apply the law and issue a decision, thus eliminating the time and expense of addressing these issues at the final hearing.

Despite the fact that Sierra Club devotes much of its Opposition to discussing the proper legal standard that applies to a Rule 12(c) motion, the standard is straightforward and largely undisputed: if, after taking the allegations of fact (not the conclusions of law) in the complaint as true, the plaintiff could not recover as a matter of law, the complaint should be dismissed. *E.g., Golding v. Ashley Cent. Irrigation Co.*, 793 P.2d 897, 898 (Utah 1990). PacifiCorp does not dispute that the Board must accept the *allegations of fact* in Sierra Club's Request for Agency Action as true.[2] Even when doing so, however, Sierra Club could not, as a matter of law, recover under the facts alleged; therefore, this case should be dismissed on the pleadings.

Sierra Club argues that the Board should be reluctant to dismiss these two issues on the theory that Sierra Club might be able to prove that its claims have a "factual basis." Opposition

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[1] In the related Intermountain Power Service Corporation ("IPSC") matter (DAQI-AN0327010-04), IPSC and the Executive Secretary filed similar Motions, requesting that the Board dismiss the IGCC and the GHG issues. IPSC, in its Motion, requested also that the Board dismiss the specific coal chemistry information issue (Claim #5 in Sierra Club's Request for Agency Action)(collectively, the Executive Secretary, IPSC, SPC and PacifiCorp, sometimes hereinafter referred to as the "Proponents").

[2] Sierra Club does, however, go too far in suggesting that the Board must "accept everything Sierra Club has alleged as true." Opposition at 10-11. To the contrary, the Board may only consider Sierra Club's *allegations of fact* as true. Of particular significance here, "legal conclusions, deductions, and opinions couched as facts are, however, not given such a presumption" on a Rule 12(c) motion. *Heffer v. Delta Air Lines, Inc.*, 2003 WL 23354484 at *1 (D. Utah 2003).

at 7. This argument is inapposite because there are no disputed material facts here.[3] Indeed, all parties agree that IGCC was not included in the BACT analysis, and that GHG was not addressed in the issuance of the AO. Rather than disputing those facts, the parties dispute the interpretation or legal meaning of the term BACT, which is a question of law. *See State v. Wallace*, 2006 UT 86, ¶ 5, 150 P.3d 540 (stating that questions of interpretation are questions of law). Specifically, the parties dispute the scope of the term "best available control technology," defined in 42 U.S.C. § 7479(3) and Rule 307-101-2 of the Utah Administrative Code. Therefore, this case is ideally poised to be resolved on the basis of the pleadings. *See* 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367 (3d ed. 2004) (explaining that a judgment on the pleadings has utility when "only questions of law remain to be decided by the . . . court. This may occur, for example, . . . in litigation in which the sole question is the applicability or interpretation of a statutory provision."); *Bushnell Corp. v. ITT Corp.*, 973 F. Supp. 1276, 1281 (D. Kan. 1997) (quoting same).[4]

Moreover, the Board should dispose of this case now—before the parties and the Board expend additional time and resources on this dispute—because it is evident that Sierra Club could not state a cause of action as a matter of law, even if it were allowed to develop additional

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[3] Sierra Club raises various issues relating to the Executive Secretary's Statement of Facts. Opposition at 28. Because that Statement of Facts was provided by the Executive Secretary and not PacifiCorp, PacifiCorp will generally leave it to the Executive Secretary to respond to Sierra Club's objections. However, as to Sierra Club's assertion that "because disputed issues of fact exist, the Board must deny those motions," PacifiCorp insists that there are no disputed material facts relevant to the resolution of the legal issues raised in Sierra Club's Request for Agency Action and addressed in PacifiCorp's Motion. Also, as addressed in more detail in section III.B.1 below, most of the statements Sierra Club mischaracterizes as allegations of fact are clearly conclusions of law.

[4] Sierra Club asserts in section II.D of its Opposition that "a party which moves for judgment on the pleadings is limited to arguments based on the facts and claims alleged in the pleadings," that [a]ll of the Proponents except IPSC adhere[d] to this basic principle," and that, accordingly, "the Board must exclude IPSC's exhibits from consideration on these particular motions." Because this arguments is directed only against IPSC in the IPSC matter, PacifiCorp will not address it in the context of the SPC matter, but will leave it to IPSC to address it in the IPSC matter.

PacifiCorp concurs in Sierra Club's position that "there is no reason for the Board to convert these motions for judgment on the pleadings into motions for summary judgment." Opposition at 44. The narrow legal issues raised by Sierra Club in its Request for Agency Action can be resolved on the pleadings, as a matter of law.

"facts." *See Koss Const. v. Caterpillar, Inc.*, 960 P.2d 255, 256 (Kan. Ct. App. 1998) (explaining that a motion for judgment on the pleadings "serves as a means of disposing of a case without trial where the total result of the pleadings frame the issues in such manner that [there is] . . . no real issue to be tried"); Wright & Miller, *supra*, § 1367 (explaining that a judgment on the pleadings "offers the potential advantage of disposing of the case at an early stage of the litigation, which may help crowded trial dockets and conserve the time and energy of both the court and the parties.").[5]

II. THE MOVANTS HAVE MET THEIR BURDEN OF PROOF

Sierra Club's arguments regarding the applicable burden of proof needlessly complicate the issue. The moving party on a Rule 12(c) motion bears the burden of proving that the non-movant is not entitled to relief under the facts alleged. *E.g., Heffner v. Delta Air Lines, Inc.*, 2003 WL 23354484 at *1 (D. Utah 2003). Here, the movants have met their burden by establishing that even under Sierra Club's allegations of fact, as a matter of law Sierra Club is not entitled to the remedy that it seeks. Accordingly, the movants are entitled to a judgment on the pleadings. *Intermountain Sports, Inc. v. Dep't of Transp.*, 2004 UT App 405, ¶ 12, 103 P.3d 716.

The burden of proof that would apply if this case were to be heard *on its merits* is irrelevant to the present motion. Nonetheless, it is worth noting that Sierra Club misstates the

[5] Sierra Club suggests that the Board should not consider the EPA letter (or EPA Reiteration Letter) that PacifiCorp attached to its Motion, on the ground that the letter is "not part of the pleadings" and therefore is improper on a Rule 12(c) motion. Opposition at 5. However, in making this argument, Sierra Club fails to distinguish between an improper factual supplement to the pleadings and a permissible citation to legal guidance. Although the Board may be limited in its consideration of certain factual materials outside of the pleadings on a 12(c) motion, the Board *may* consider a variety of outside legal argument and authority on a 12(c) motion. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 13, 104 P.3d 1226. The EPA letter is simply a legal guidance in support of PacifiCorp's legal argument, attached to PacifiCorp's Motion for the convenience of the Board and the parties. *Cf.* D. Utah Civ. R. 7-2 ("if an unpublished decision is cited, a copy of that decision must be attached to the memorandum or paper in which it is cited and served on all parties."). The letter is *not* a factual supplement to the pleadings, and the Board may consider it. Ironically, Sierra Club attached a CD-ROM with over 2,000 pages of factual materials to its Opposition. Even assuming that every fact in those materials were true, Sierra Club would still have no legal basis for its IGCC and GHG claims.

burden. It is well-established that a party who seeks review of an agency's order carries the burden of proving the agency's alleged impropriety. *WWC Hold'g Co., Inc. v. Pub. Serv. Comm'n of Utah*, 2002 UT 23, ¶ 2, 44 P.3d 714 (Utah 2002); *SEMECO Indus., Inc. v. Utah State Tax Comm'n*, 849 P.2d 1167, 1174 (Utah 1993) (Durham, J., dissenting). In addition, the petitioner, Sierra Club, must overcome the presumption of correctness which accompanies the actions of an administrative agency, which means that the Executive Secretary's "actions [in issuing the AO to SPC are] endowed with a presumption of correctness and validity." *Cottonwood Heights Citizens Ass'n. v. Board of Comm'rs. of Salt Lake County*, 593 P.2d 138, 140 (Utah 1979). Thus, if Sierra Club were to survive these Motions, it would then shoulder the burden of showing that the Executive Secretary erred in issuing the permits.[6] Regardless, the Board need only concern itself with the Rule 12(c) standard at this stage of the proceedings. Applying that standard, the movants are entitled to prevail as a matter of law.[7]

[6] Sierra Club's discussion of the standard that a party bears when *applying* for a permit is completely irrelevant to this motion. Further, that burden would not, as Sierra Club seems to suggest, relieve Sierra Club of its burden to prove that the Executive Secretary erred approving the permits.

[7] PacifiCorp need not respond to Sierra Club's third argument regarding whether the Board may consider facts and legal arguments that have arisen since the DAQ decision, as that argument is directed only at IPSC. PacifiCorp does point out, however, that there have been no changes to the facts or law that would suggest that the Board should reverse its decision to issue the permits.

III. ARGUMENT

A. IGCC

The required "top-down" BACT process includes five steps: (1) identify all available control technologies ("Step 1"), (2) eliminate infeasible technologies, (3) rank remaining technologies, (4) evaluate the most effective controls (assessing the energy, environmental and economic impacts), and (5) select the most effect option. EPA's New Source Review Workshop Manual ("NSR Manual"), at B.5. However, it is only the legal issue of whether the Executive Secretary is required to include IGCC in Step 1 that is at issue here.

By arguing that the Board must reinterpret the BACT regulation so as to require a proposed power plant that has already selected another type of electrical production technology (here, a CFB Boiler) to include in Step 1 an altogether different technology (IGCC), Sierra Club is arguing that SPC must "redefine the source" for its proposed plant.[8]

1. IGCC Does Not Fall Within BACT -- Sierra Club is Attempting to Label What are Clearly Conclusions of Law as Allegations of Fact

Sierra Club asserts that based on its alleged facts, IGCC falls within the definition of BACT, which is defined to mean:

> [A]n emission limitation and/or other controls to include design, equipment, work practice, operation standard or combination thereof, based on the maximum degree or reduction of each pollutant subject to regulation under the Clean Air Act and/or the Utah Air conservation Act emitted from or which results from any emitting installation, which the Air Quality Board, on a case-by-case basis taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such installation through application of production *processes* and available *methods*, systems, and *techniques*, including fuel cleaning or treatment or innovative fuel combustion techniques *for control of each such pollutant....*"

[8] Sierra Club asserts that because the Proponents emphasize different parts of this definition, that there is some "deep factual divide between their positions." Opposition at 15. Sierra Club has not and cannot identify any conflicting positions. That the Proponents may have emphasized different parts of the definition only reflects the fact that various advocates are likely to have various emphases.

Utah Admin. Code. R307-101-2 (emphasis added).[9]

Sierra Club argues that for purposes of these Motions the Board must accept its allegations of fact as true, and then specifies nine statements that relate to IGCC. However, most of those statements are NOT allegations of fact but are conclusions of law, and the remaining statements are irrelevant to and unessential for the resolution of these Motions because they relate only to whether IGCC should be eliminated under Step 2 of the five step BACT process, whereas at issue here is whether IGCC must be included in Step 1 in the first place:

> *"1. IGCC is a* ***method*** *of producing electricity by gasifying coal, removing pollutants . . . ."* Whether IGCC is an available "method ... for control of each such pollutant" under the language of the BACT definition regulation is a legal conclusion. [10]
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> *"2. IGCC is an available* ***technology*** *for producing electricity from coal."* Whether IGCC is a "technique . . . for control of each such pollutant" under the language of the BACT definition regulation is a legal conclusion. Moreover, whether it is an "available" technology is a determination that is made only after a technology has been included in Step 1. Accordingly, that the parties may dispute whether IGCC is sufficiently "available" is irrelevant because what is at issue here is whether IGCC needs to be included in Step 1 in the first place.
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> *"3. IGCC is technically feasible . . . ."* Whether a control technology is "technically feasible" is a determination that is made during Step 2. Accordingly, that the parties may dispute whether IGCC is technically feasible is irrelevant because what is at issue here is whether IGCC needs to be included in Step 1 in the first place.
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> *"4. IGCC is the top ranked control technology."* Whether a control technology is the top ranked is a determination that is made during Step 3. Accordingly, that the parties may dispute whether IGCC is the top ranked is irrelevant because what is at issue here is whether IGCC needs to be included in Step 1 in the first place.
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> *"5. IGCC is an available, demonstrated clean coal combustion* ***technology*** *. . . ."* Whether IGCC is a "technique . . . for control of each such pollutant" under the language of the BACT definition regulation is a legal conclusion. Moreover, whether any given technology is an "available," demonstrated technology is a determination that is made

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[9] This BACT definition was amended and renumbered as Utah Admin. Code R307-401-2 in 2006. The only change was that the term "installation" was replaced with "proposed stationary source." The only significance this change has to this appeal is that it clarifies that the processes, methods and techniques that are to be identified in the BACT analysis are to be applied to the installation or source that has been "proposed" by the applicant.

[10] In footnote 43 Sierra Club emphasizes that the parties cannot ignore the language in the BACT definition following "through application of." However, Sierra Club self-servingly ignores the subsequent and critical "for the control of each such pollutant" language following "through application of."

only after a technology has been included in Step 1. Accordingly, that the parties may dispute whether IGCC is a sufficiently "available" is irrelevant because what is at issue here is whether IGCC needs to be included in Step 1 in the first place.

"6. IGCC is a production ***process*** *that can be used ...."* Whether IGCC is a " process . . . for control of each such pollutant" under the language of the BACT definition regulation is a legal conclusion.

"7. IGCC is a ***method*** *for generating electricity . . . ."* Whether IGCC is an available "method ... for control of each such pollutant" under the language of the BACT definition regulation is a legal conclusion.

"8. IGCC is an innovative fuel combustion ***technique****, and Congress intended . . . ."* Whether IGCC is a "technique ... for control of each such pollutant" under the language of the BACT definition regulation is a legal conclusion.

"9. Requiring consideration of IGCC would not be redefining the source." Whether requiring consideration of IGCC would constitute a legally impermissible "redefining of the source" under the language of the BACT definition regulation and under the other applicable statutory and regulatory air permitting requirements is clearly a legal conclusion.

By mislabeling conclusions of law and raising irrelevant facts, Sierra Club would deprive the Board of its statutory prerogative to interpret the law (*i.e.*, the BACT definition regulation).

2. It is the Prerogative of the Applicant to Propose the Type of Source, and the BACT Analysis is Then Tailored to that Proposed Source

The BACT definition requires that "production *processes* and available *methods*, *systems* and *techniques*" that are potentially applicable to the proposed source be included in Step 1. However, BACT does not require the inclusion of altogether different "alternative sources" that would replace the proposed source. *In re Spokane Regional Waste-to-Energy Applicant, PSD App. No. 88-12,* 1989 WL 266360, n.7 (EPA June 9, 1989). In this case, the applicant has not proposed a geo-thermal, a gas-fired source, or an IGCC source – but rather a CFB Boiler source.

Sierra Club argues that the established interpretation "obliterate[s] the BACT analysis," because once an installation or source "has been identified in the notice of intent, no changes could be made to it based on the 'application of production processes and available methods . . .

." Opposition at 17. On the contrary, once a type of source has been identified, changes can be made by the "application of" a variety of appropriate "processes . . . methods . . . and techniques . . . for control of each such pollutant," just as contemplated under the BACT definition.

Sierra Club argues that under the established interpretation "an applicant could identify a completely antiquated installation in its notice of intent and neither he nor DAQ would have the authority to require the applicant to modernize that identified installation." Opposition at 18. The term "installation" in the BACT definition obviously makes reference to the source as it is preliminarily conceptualized and proposed in the NOI, not the source as it is ultimately designed and configured with whatever "production processes and available methods, systems and techniques . . . for control" that have been deemed appropriate through the BACT analysis. This is confirmed by the fact that the BACT definition was amended in 2006, and the term "installation" was replaced with "proposed stationary source." Utah Admin. Code R307-401-2 (emphasis added).[11]

3. Whether IGCC is Process, a Method or a Technique for Control Under the BACT Definition is a Conclusion of Law

Sierra Club asserts that the parties "dispute the factual nature of IGCC," *i.e.,* is IGCC proven, is IGCC available, etc. Opposition at 19. Whether the parties dispute the factual nature of IGCC is irrelevant because for the purpose of these Motions the parties must accept as true Sierra Club's *allegations of fact* (though not its conclusions of law). As addressed in section III.A.1. above, whether IGCC is a process, method or technique for the control of pollution under the language of the BACT definition regulation is a conclusion of law.

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[11] Sierra Club argues also that the State's established "interpretation conflicts with the federal definition of BACT, and that "[i]n no way does the federal regulation suggest that, in applying the BACT analysis, an agency must accept as unalterable a 'discrete' installation or an already 'identified' installation." The State's established interpretation is perfectly consistent with the federal definition. PacifiCorp do not argue that an agency must accept an already "identified" installation. Rather, after the applicant to selected the installation or source, through the BACT analysis appropriate emission controls specifically tailored to that the selected source are applied.

Notwithstanding Sierra Club's earlier pretense that its statements that IGCC is a "process" or a "method" or an "technique" are allegations of fact, *see* Opposition at 16, in this section of its Opposition Sierra Club acknowledges that those statements are conclusions of law -- that the Board "will ultimately determine the legal meaning of those terms." Opposition at 20.

Sierra Club asserts that IGCC is the "quintessential" sort of "process" meant to be considered in a BACT analysis. Opposition 20. However, under the BACT definition, the question is whether IGCC is a "production process . . . method . . . or technique . . . for control of each such pollutant;" or, instead, an altogether different, redefined source. Utah Admin. Code R307-101-2 (emphasis added). Sierra Club attempts at every turn to ignore that tailing final phrase – "for control of each such pollutant." What the BACT analysis addresses is "the application of" processes, methods and techniques "for control of" the pollutants emitted by the type of source proposed by the applicant, not the application of the underlying source proposed.

Sierra Club argues that "the emission limits identified as BACT must incorporate consideration of more than just add-on emission control technology – they must also reflect appropriate . . . processes capable of reducing emission . . . ." Opposition at 21. However, here, Sierra Club is not just talking about considering processes capable of reducing the emissions from the selected source, but about considering the wholesale substitution of the selected source.

4. IGCC is Not a Required Component of a BACT Analysis, and is Not Widely Accepted as a Component of BACT Analysis

In support of its claim that IGCC is "widely accepted" as a required component of a proper BACT analysis, Sierra Club asserts that "several states have required consideration of IGCC . . . ." Opposition at 22. Yet, of the twelve or more states that have encountered the issue, Sierra Club itself purports that only THREE have required that IGCC be included (Illinois, New Mexico and Montana). The vast majority (at least nine) have expressly rejected Sierra Club's

reinterpretation. *See* transcript of the Board's May 10, 2006 hearing, at p.64 (regarding similar decisions by Wisconsin, West Virginia, Arkansas, Kentucky, Indiana, Florida, Arizona, Wyoming, Colorado and others).

Moreover, as to those few states that have included IGCC, they did not determine that the BACT definition or any other regulations or statutes required them to include IGCC, but rather that the applicable statutes and regulations allowed them the discretion to engage in a broader analysis and to include IGCC if they so desired. The NSR Manual provides that "states have the discretion to engage in a broader analysis if they so desire." NSR Manual at B.13.

5. Requiring IGCC in BACT Constitutes an Impermissible "Redefining of the Source," and a "More Stringent" State Rule

Under the long-established practice of the EPA, as reflected in its NSR Manual and numerous Environmental Appeals Board ("EAB") decisions, the applicant proposes the particular type of source, and then through the BACT analysis the applicant analyzes available control technologies for the particular source proposed. As explained in EPA's NSR Manual, "[h]istorically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives. For example, applicants proposing to construct a coal-fired electric generator, have not been required by EPA as part of a BACT analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting per unit product." NSR Manual, at B.13.

If IGCC were to be included in Step 1 here it would not be in addition to, but rather in lieu of, the proposed CFB Boiler source. To avoid acknowledging this obvious redefinition, Sierra Club attempts to classify IGCC not as a source, but as a mere process, method or technique for the control of pollutants from the source. Opposition at 23. Yet even under that misclassification, contrary to Sierra Club's assertion, the Board does not have to look at any of

disputed facts about IGCC (*i.e.,* whether it is available, achievable, etc. – those would only be considered later during Steps 2-5), but only at whether IGCC is a different source.[12]

Sierra Club notes that "Utah's BACT definition, as well as its federal counterpart" calls for emission limitations based on processes, methods and techniques. Opposition at 24. However, as fully addressed above, those definition calls for limitations based on the "application" of processes, methods and techniques "for control" of pollutants from the proposed source, not based on the application of a different, redefined source.

The EPA's long-established prohibition against "redefining the source, and against requiring the inclusion of IGCC, was reiterated in a December 13, 2005 letter from Stephen D. Page ("EPA's Reiteration Letter"). On September 25, 2006, the EPA entered into an agreement with several environmental organizations, and in that context the EPA readily stipulated that the Reiteration Letter was not promulgated as a regulation under the Clean Air Act, was not a final agency action, and by itself did not created any new rights, duties or obligations. However, the Reiteration Letter still reflects the longstanding and continuing federal practice and policy. In contrast, Sierra Club dramatically overstates the scope of the September 25, 2006 stipulation by asserting that the Reiteration Letter no longer has any "persuasive value as a statement of EPA's position on IGCC." Opposition at 26. The stipulation provides nothing of the sort.

Sierra Club actually suggests that EPA's long established policy has been reversed by the State of Illinois by a recent position taken by the Illinois Environmental Protection Agency ("IEPA") in the *Praire State* matter. (Sierra Club did not address how it is that a State establishes new EPA policy). Of the more than twelve states that have encountered the issue,

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[12] Sierra Club asserts that the Board must not allow the Executive Secretary to use the "redefining the source" prohibition to avoid considering the effectiveness and environmental benefits of an IGCC option. Opposition at 24. Just like the Executive Secretary certainly can use the "redefining the source" prohibition to avoid considering the effectiveness and benefits of gas-fired, geo-thermal or other source options, it can use the prohibition to avoid considering the IGCC option here.

Illinois is one of only three that Sierra Club purports have opted to include IGCC in their BACT analyses. In that case IEPA had the Praire State Generating Company include IGCC. That voluntary, independent decision of the State of Illinois to include IGCC certainly does not constitute a reversal by EPA of EPA's long-established policy. Moreover, nothing in that case suggests that IEPA concluded that it was required under the BACT definition to include IGCC. Instead, Illinois opted to include IGCC because Illinois had the discretion and desire to do so. Sierra Club asserts that "EPA's Environmental Appeals Board ["EAB"] strongly indicated that IGCC is a control technology that must be considered in the BACT analysis," and that "[t]he EAB specifically assumed that . . . the [IEPA] correctly included IGCC in the facility's BACT analysis." Opposition at 25. A review of the *Praire State* decision readily demonstrates that the EAB gave no indication that IGCC must be considered, and made no assumption that IEPA was correct in requiring the inclusion of IGCC. Rather, the EAB simply recognized that IEPA had exercised its discretion to include IGCC, which discretion and prerogative is contemplated under the NSR Manual. "However, this is an aspect of the PSD permitting process in which states have the discretion to engage in a broader analysis if they so desire." NSR Manual at B.13.[13]

6. The Board is Not Required to Determine that IGCC Must be Included. Even if the Board were Inclined to Determine IGCC Should be Included, It Should Do So Through Rulemaking

Sierra Club asserts that in deciding what is BACT, the "language of the BACT regulation *requires* that the Board decide this question for each of these facilities through adjudication." Opposition at 27. Although the language of the BACT regulation does *require* the Executive Secretary to undertake an appropriate BACT analysis and, on a case-by-case basis, ultimately

[13] Finally, the Utah Code, Section 19-2-106, prohibits the Board from making any rule "for the purpose of administering a program under the federal Clean Air Act" that would be "more stringent than the corresponding federal regulations which address the same circumstances." The creation of a new state rule that would be more stringent would violate this prohibition.

"select BACT," the Board certainly has the prerogative to adopt implementing regulations to clarify any questions as to the parameters of the BACT process. Utah Code Ann. §§ 19-2-104(1)(a) (vesting the Board with broad authority to make rules "regarding the control, abatement, and prevention of air pollution.").[14]

B. Greenhouse Gas Emissions

The question here is a legal issue -- whether there was any existing statute or regulation requiring the Executive Secretary to regulate GHG. Neither the federal Clean Air Act nor the Utah Air Conservation Act or its implementing regulations require the State of Utah to regulate GHG. Under the Utah Air Conservation Act, the Board may make rules "regarding the control, abatement, and prevention of air pollution," and the Executive Secretary may, as authorized by the Board, enforce such rules as the Board may make. Utah Code Ann. §§ 19-2-104(1)(a) & 107(2)(g).[15] However, in its discretion, the Board has never made any such rules for the regulation of GHG.[16]

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[14] Sierra Club's attempt to reinterpret the BACT definition and reverse the policy against "redefining the source," is tantamount to a rule-making. Such a significant and broadly applicable public policy change should be addressed through legislation or administrative rulemaking. The Board should decline to undertake the sort of de facto rulemaking that Sierra Club is urging. Sierra Club argues that other states have not found it necessary to address this issue through rulemaking, but have addressed it through case-by-case adjudications. This argument actually highlights why such policy issues should be addressed by rulemaking – to avoid costly and drawn out adjudications, and to allow interested parties (like PacifiCorp here) the opportunity to participate without having to incur the significant litigation costs when groups such as Sierra Club object to their requests to intervene.

[15] If the Board were to ever make such a rule for the regulation of GHG, it should do so through the administrative rulemaking process, rather than through this administrative adjudication. As addressed above in detail, significant and broadly applicable public policy issues such as this are best resolved openly by legislation or rulemaking, rather than through a case-specific adjudication. The Board should avoid the sort of de facto rulemaking that Sierra Club is urging here.

[16] In any event, Section 19-2-106 of the Utah Code would prohibit the Board from making any rule "for the purpose of administering a program under the federal Clean Air Act" that would be "more stringent than the corresponding federal regulations which address the same circumstances." The creation of a new state rule that would be more stringent than the current federal regulations (which do not regulate GHG) would necessarily violate this statutory prohibition.

1. These Motions for Judgment on the Pleadings on the GHG Issue Raise Only Legal Issues, and are Based on the Narrow and Express Allegations of Sierra Club's Request for Agency Action

In its Request for Agency Action, Sierra Club asserts that "[p]ursuant to the Clean Air Act and Utah Air [Conservation] Act and its implementing rules, the State of Utah has the legal obligation to regulate greenhouse gases," and that "pursuant to the [BACT] definition . . . , Utah is required to consider other environmental impacts, such as greenhouse gas emissions, when determining BACT." In short, Sierra Club raises only the following simple legal issue: whether the Clean Air Act, the Utah Air Conservation Act and its implementing rules, or the BACT regulation should be interpreted to obligate Utah to regulate or consider GHG.

As addressed above in section I., for purposes of these Motions for Judgment on the Pleadings, the Board need only accept Sierra Club's allegations of fact, NOT its conclusions of law. 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367 (3d ed. 2004). The issue of whether the law should be interpreted so as to obligate Utah to regulate or consider GHG is clearly a legal rather than a factual issue. *See State v. Wallace*, 2006 UT 86, ¶ 5, 150 P.3d 540 (stating that questions of interpretation are questions of law).

Sierra Club asserts that for purposes of these Motions the Board must accept its "allegations of fact" as true, and then specifies seven specific statements that relate to the regulation of GHG. However, some of those statements are NOT allegations of fact but are conclusions of law, and the rest of those statements are unessential for the resolution of these Motion because they are irrelevant to the narrow legal issue Sierra Club has raised here – whether the Clean Air Act, the Utah Air Conservation Act and its implementing rules, or the BACT process obligate Utah to regulate or consider GHG.

> *"1. Carbon dioxide is an air pollutant."* The Clean Air Act provides that the federal government and the states shall share responsibility for the nation's air quality. The EPA creates and maintains a list of identified air pollutants that "cause or contribute

to air pollution which may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7408(a)(1)(A), and then establishes national ambient air quality standards ("NAAQS") to protect against such dangers for each identified pollutant. *Alaska Dep't of Envtl. Conservation v.* EPA, 540 U.S. 461, 469 (2004). The states then have the "primary responsibility" to ensure that air quality within their borders meets those NAAQS. 42 U.S.C. § 7407(a). Significantly, EPA has not included GHG on its list of identified air pollutants and, accordingly, has not established any NAAQS for GHG and has not established any other regulations for GHG.

Accordingly, under the Clean Air Act, whether carbon dioxide is a federally listed or identified air pollutant that has an associated NAAQS is purely a legal issue. Likewise, under the Utah Air Conservation Act and its implementing regulations, whether there is a NAAQS for Utah to enforce is a legal issue.

Under the language of the BACT definition regulation, whether the regulation obligates Utah to consider GHG when determining BACT will be determined by interpreting the language of the BACT regulation. This is a legal issue.

. *"2. Nitrous oxide is an air pollutant."* *See* Statement #1 above.

"3. Carbon dioxide emissions are extremely harmful, and are generally recognized by Utah and the United States to be a cause of climate change." This statement is unessential for the resolution of these pending Motions. Whether these emissions are harmful and should, as a matter of policy, be regulated by Utah and the United States is irrelevant to the narrow legal issue Sierra Club has raised here -- whether the Clean Air Act, the Utah Air Conservation Act and its implementing rules, or the BACT regulation obligates Utah to regulate or consider GHG.

"4. The choice of production process can substantially affect emissions of [NAAQS] pollutants, toxics and carbon dioxide." This statement is unessential for the resolution of these pending Motions. Whether the choice of production process can substantially affect emissions is irrelevant to the narrow legal issue Sierra Club has raised here – whether the Clean Air Act, the Utah Air Conservation Act and its implementing rules, or the BACT regulation obligates Utah to regulate or consider GHG.

"5. IGCC is a commercially available production technology for coal-fired power plants that has lower emissions rates and the ability to separate carbon dioxide emissions for sequestration." This statement is unessential for the resolution of these pending Motions. Whether IGCC is a "commercially available" production technology . . ." is irrelevant to the narrow legal issue Sierra Club has raised here – whether the Clean Air Act, the Utah Air Conservation Act and its implementing rules, or the BACT regulation obligates Utah to regulate or consider GHG.[17]

[17] As an aside, and wholly unnecessary for the resolution of the pending Motions, the NSR Manual makes it clear that "[t]echnologies which have not yet been applied to (or permitted for) full scale operations [as opposed to experimentally] need not be considered available." NSR Manual at B.11.

As to whether the BACT regulation obligates Utah to consider GHG, this statement #5 is irrelevant for the additional reason that whether IGCC is "commercially available" is a determination that would be made, if at all, only after IGCC had been included in Step 1 of the BACT analysis. Because IGCC need not be included in Step 1 in the first place, it goes without saying that it need not be considered during Step 1.

"6. IGCC would reduce the emissions of carbon dioxide from IPSC Unit 3." See Statement #7 below.

"7. IGCC would reduce the emissions of carbon dioxide and nitrous oxide from the SPC facility" This statement is unessential for the resolution of these pending Motions. Whether IGCC would actually "reduce the emissions . . ." is irrelevant to the narrow legal issue Sierra Club has raised here – whether the Clean Air Act, the Utah Air Conservation Act and its implementing rules, or the BACT regulation obligates Utah to regulate or consider GHG.

As to whether the BACT regulation obligates Utah to consider GHG, this statement #7 is irrelevant for the additional reason that whether IGCC would actually "reduce the emissions" is a determination that would be made, if at all, in Steps 3 and 4 of the BACT process. Because IGCC need not be included in Step 1 in the first place, it goes without saying that it need not be considered during Steps 3 and 4.

In short, Sierra Club is attempting to label what are clearly conclusions of law as allegations of fact, and to raise other issues that are unessential for the resolution of the narrow legal issue Sierra Club has asserted in its Request for Agency Action, in an attempt to survive these Motions for Judgment on the Pleadings. Under this approach Sierra Club would deprive the Board of its statutory prerogative, and excuse the Board of its statutory duty, to interpret the law.

2. UDAQ is Not Required to Regulate Carbon Dioxide or other GHG as Part of its Administration of the Clean Air Act Program Approved by EPA

Neither EPA, the federal agency charged with administering the Clean Air Act, nor any court, has ever held that the Clean Air Act requires the EPA to regulate GHG. *In re: Kawaihae Cogeneration* Project, 1997 WL 221391, 7 E.A.D. 107 (E.P.A. April 28, 1997)("[A]t this time there are no regulations or standards prohibiting, limiting or controlling the emissions of greenhouse gases from stationary sources. Carbon dioxide is not considered a regulated air

pollutant for permitting purposes."). Accordingly, as Sierra Club itself acknowledges, various environmental groups and others have brought a suit before the U.S. Supreme Court asking for a reinterpretation. By stating that the suit before the U.S. Supreme Court creates the "possibility of a decision requiring future regulation of greenhouse gas," Sierra Club necessarily acknowledges that unless and until the U.S. Supreme Court alters the status quo and reinterprets the Clean Air Act, GHG is and will remain unregulated. Opposition at 33 (emphasis added).

Sierra Club then notes that "[t]his subsection of the [Opposition] memorandum summarizes legal arguments before [the U.S. Supreme Court in that suit] and explains why an affirmative ruling from the Supreme Court would affect Utah PSD permits." Opposition at 33.[18] Of course, those strained legal arguments that Sierra Club summarized in its Opposition are the very arguments that have been uniformly rejected by federal and state courts around the country, which is why those groups that brought the suit had to resort to bringing it before the U.S. Supreme Court.

Ironically, Sierra Club perhaps says its best – "If the U.S. Supreme Court" imposes a new reading on the Clean Air Act so as to require the regulation of GHG, "such a decision could also require the establishment of carbon dioxide emission limits in this permit for . . . the proposed SPC plant." Opposition at 34 (emphasis added). Only if this and if that might there ever be a requirement to regulate GHG. However, unless and until all of those "ifs" evolve into statutory and regulatory "requirements," GHG remains and will continue to remain unregulated.

Of course, even IF the U.S. Supreme Court were to reinterpret and read a new GHG regulation requirement into the Clean Air Act, it will then be up to EPA and the individual states

[18] For example, Sierra Club states that the "Clean Air Act specifically includes carbon dioxide in a list of 'air pollutants,'" but its reference in support thereof is to a section of the Clean Air Act that pertains not to the establishment or enforcement of NAAQS or any other regulatory controls or limitations, but rather to "nonregulatory strategies." 42 U.S.C. 7403(g)(1).

to ascertain the nature and extent of their GHG regulation – which may or may not include the regulation of GHG from coal-fired power plants. Of course, at this point, because no regulations have been ever been promulgated and no standards have been established, there can be no GHG regulation.

Sierra Club asserts that its statement that "carbon dioxide is an 'air pollutant'" within the statutory definition of the Clean Air Act is an allegation of fact rather than a conclusion of law, and, accordingly, for purposes of these Motions the Board must take that statement as true. As addressed in detail above in section III.B.1., as to the narrow issue that Sierra Club has articulated in its Request for Agency Action – whether the Clean Air Act, the Utah Air Conservation Act and its implementing rules, or the BACT regulation obligates Utah to regulate or consider GHG -- this is a legal issue that is resolved by interpreting the law, not a factual issue.

Finally, just as with the Clean Air Act, the Utah Air Conservation Act does not require the regulation of GHG. The most Sierra Club claims about the Act is that it "supports" the regulation of GHG, but this so-called "support" is manifested only by virtue of the Act's generic articulated purpose – "to provide for a coordinated statewide program for air pollution prevention, abatement, and control." Opposition at 34. Sierra Club goes on to state that "DAQ has recognized that 'the consensus of most scientists worldwide is that increasing concentrations of greenhouse gases will lead to significant climate warming . . . ." Opposition at 34 (citing UDAQ's webpage). However, Sierra Club has selectively plucked this language from a description of a multi-phase program whereby UDAQ will inventory the State's GHG emissions, use that baseline inventory to assist in the analysis of potential policy options, and finally, formulate a state action plan. (www.airquality.utah.gov/PLANNING'Grnhsgas.htm)

Accordingly, the context that Sierra Club omitted is that the State is only in the early phase of a multi-phase program to formulate an action plan to deal with GHG. The State certainly has no plan now to regulate GHG. Whether the action plan Utah ultimately adopts will include the regulation of GHG, and specifically, the regulation of GHG from coal-fired power plants, is a matter of mere speculation at this point.

3. UDAQ is Not Required to Consider Carbon or other GHG in the BACT Collateral Impacts Analysis

Because Sierra Club cannot cite to any statutory, regulatory or other legal authority to support its argument that the Clean Air Act, [19] or the Utah Air Conservation Act and its implementing regulations, obligate the regulation of GHG, it is left to argue that the BACT definition inferentially requires that GHG be considered in the BACT process. Opposition at 35. However, nothing in the language of the definition requires Utah to consider GHG in its BACT determination. Utah Admin. Code R307-101-2. Not surprisingly, neither UDAQ, the Executive Secretary, the Board nor any Utah court has ever interpreted the BACT definition in this manner so as to require consideration of GHG. Because Sierra Club cannot cite to any language in the BACT regulation or any supporting interpretation, it is finally left to argue that even if GHG is not required to be regulated, "it is entirely appropriate for agencies to consider" GHG in the BACT process. Opposition at 36 (emphasis added). However, irrespective of whether a particular State in its discretion decides it would be "appropriate" to consider GHG, that does not

[19] The Clean Air Act does not obligate Utah or any other state to regulate GHG. Under the federal Clean Air Act, EPA is required to identify certain air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and to then establish NAAQS to protect against adverse effects from each identified pollutant. 42 U.S.C. § 7408(a)(1). Significantly, EPA has not identified carbon dioxide or other GHG as regulated air pollutants, and has not established any NAAQS for GHG.

mean that the Clean Air Act or the Utah Air Conservation Act requires Utah to regulate or consider GHG.[20]

Sierra Club states that "even if carbon dioxide is not treated as a regulated pollutant," it has still adequately alleged in its pleadings that DAQ was required to consider GHG "as a non-regulated pollutant in the collateral impacts stage of the BACT analysis." Opposition at 35. The "collateral impacts" step of the BACT analysis to which Sierra Club refers is Step 3. Utah Admin. Code R307-101-2. More specifically, Sierra Club argues that an IGCC alternative would have had lesser environmental impacts, and that the Executive Secretary should have required the consideration of those "differential collateral environmental impacts." Opposition at 36. As addressed above in section III.A., if the collateral environmental impacts of GHG needed to be considered at all in the BACT process, it would be in Step 3. However, because IGCC need not be included in Step 1 in the first place (as addressed in section III.A.), it goes without saying that any collateral environmental impacts of GHG under IGCC need not be considered at Step 3.

Finally, Sierra Club suggests that the Board must accept "as true" its allegation that GHGs are regulated "air pollutants" and must be considered under the BACT process. Opposition at 36. Of course, as addressed above, the Board need only accept as true Sierra Club's "allegations of fact," not such conclusions of law. Whether, under the language of the BACT regulation, the Executive Secretary is obligated to consider GHG when analyzing BACT, will be determined by interpreting the language of the BACT regulation. Such questions of interpretation are issues of law and should be resolved by the Board. *State v. Wallace*, 2006 UT 86, ¶ 5, 150 P.3d 540.

[20] As addressed above, even if the Clean Air Act or the Utah Air Conservation Act were to be reinterpreted so as to obligate the regulation of GHG, no regulation has ever been promulgated and no standard has ever been established to implement such regulation. Without any such rules or standards the Executive Secretary would be unable to consider or ascertain appropriate GHG emission levels in the BACT process.

IV. CONCLUSION

The IGCC and GHG issues articulated in Sierra Club's Request for Agency Action present only the legal issues of whether the Executive Secretary was required to include IGCC in the BACT analysis, and to address GHG in the issuance of the AO. Because Sierra Club's Request for Agency Action fails as a matter of law on these two uses, the Board should grant PacifiCorp's Motion for Judgment on the Pleadings.

Dated this 26th day of March, 2007.

ATTORNEYS FOR PACIFICORP

STOEL RIVES LLP

Martin Banks

Martin K. Banks

Michael Jenkins by MB

Michael G. Jenkins,
Assistant General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2007, I emailed ~~and mailed~~ a true and correct copy of the foregoing **PACIFICORP'S REPLY TO SIERRA CLUB'S CONSOLIDATED OPPOSITION TO MOTIONS FOR JUDGMENT ON THE PLEADINGS** to the following:

Fred Nelson
Attorney General's Office
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
fnelson@utah.gov

Paul M. McConkie
Assistant Attorney General
160 East 300 South
Salt Lake City, Utah 84114
pmcconkie@utah.gov

Fred Finlinson
Finlinson & Finlinson
11955 Lehi-Fairfield Road
Lehi, Utah 84043
f2fwcrf@msn.com

Brian Burnett
Callister Nebeker
Gateway Tower East, Suite 900
10 East South Temple
Salt Lake City, Utah 84133
brianburnett@cnmlaw.com

Joro Walker
Dave Becker
1473 South 1100 East, Suite F
Salt Lake City, Utah 84105
jwalker@westernresources.org
dbecker@westernresources.org

H. Michael Keller
Matthew F. McNulty, III
VanCott, Bagley, Cornwall & McCarthy
50 South Main Street, Suite 1600
Salt Lake City, Utah 84114
mkeller@vancott.com
mmcnulty@vancott.com

Chris C. Stephens
Assistant Attorney General
Environment Division
Utah Attorney General's Office
150 North 1950 West
PO Box 144820
Salt Lake City, Utah 84114-4820
cstephens@utah.gov

Blaine Rawson
Holme Roberts & Owen
299 S. Main Street, Suite 1800
Salt Lake City, Utah 84111
blaine.rawson@hro.com

Michael Jenkins
Asst. General Counsel
PacifiCorp
201 South Main, #2200
Salt Lake City, Utah 84111
Michael.jenkins@pacificorp.com

Matt Bank